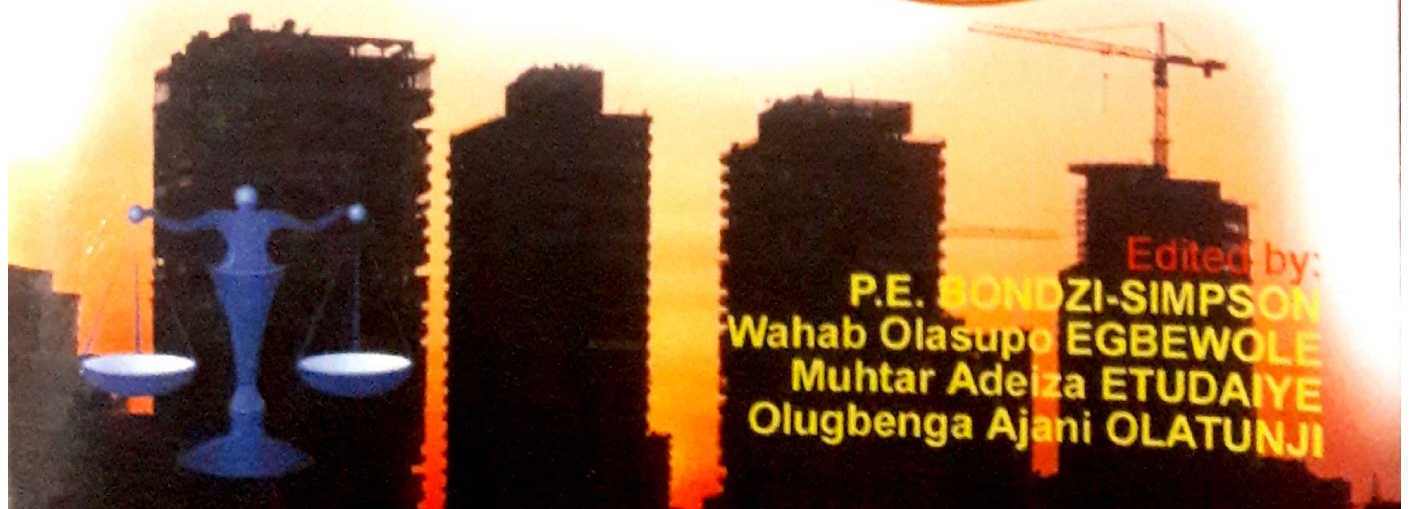


Law and Sustainable Development in Africa



Edited by:
P.E. BONDZI-SIMPSON
Wahab Olasupo EGBEWOLE
Muhtar Adeiza ETUDAIYE
Olugbenga Ajani OLATUNJI

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TABLE OF CONTENTS

List of Contributors	iii
Table of Contents	vi
Foreword	x
Table of Cases	xi
List of Statutes	xiii
Index	445

PART ONE

SOCIO-POLITICAL SUSTAINABILITY

1. Peace and Sustainable Development in Africa by Prof I.O. Albert	3
2. Legal and Institutional Frameworks for Peace and Sustainable Development by Lanre Aladeitan	26
3. Hijacking of Aircraft: Threat to Peace and Sustainable Development by Dr Adedoyin-Raji J.O. and Ismail A.M.	39
4. Legal Education, Globalization and Sustainable Development by Dr Wahab Egbewole, Dr Etudaiye M.A., Owoade A.A., and Olatunji O.A	55
5. Challenges of Sustainable Development in Nigeria: Legal Perspectives by Imam-Tamim M.K.	84
6. The Rights of Indigenous People to Sustainable Development in Africa: the Case of Gbagyi of Nigeria by Adeoye, R.O	117
7. Constitutionalism and Sustainable Development in Africa: the Nigerian Legislative and Institutional Responses by Dr A.T. Sheu	142
8. Sustainable Development and Housing Delivery in Nigeria: An Examination of the Legal Perspective of the Public Private Partnership Initiatives by Dr M.M. Akanbi and Olatunji O.A	172
9. Public-Private-Partnership and Sustainable Development in Nigeria by M.T. Adekilekun	204
10. Socio-Economic Rights for Sustainable Development in Nigeria: Prospects and Challenges by A.O Sambo and A.B. Abdulkadir	218
11. Corporate Social Responsibilities and Sustainable Development in Nigeria: the Role of Language Rights by Onuora-Oguno Azubike and Ajoku O.O.	236

Table of Contents

12. Child Labour and Sustainable Development by Owolabi E.F.....	248
13. Food Security and Sustainable Development in Africa by Prof. O.A. Omotesho.....	264
14. Poverty, Sustainable Development, and the Future Generation by Dr I.O. Babatunde.....	285
15. Poverty and Its Implication for Development in Nigeria by Prof. H.A. Saliu and A.I. Aladegbola.....	312

PART TWO

ECONOMIC SUSTAINABILITY

16. Tax Education and Mobilization: A Means to Sustainable Development in Nigeria by Olokooba S.M., Kareem A.A., and Adimula B.....	351
17. The Nigerian Constitution, Taxation, and Sustainable Development by H.I. Sa'adu.....	367
18. Financial Innovation and Sustainable Development in Nigerian Financial System by R.T. Salman and O.F. Erudaiye-Muhtar.....	380

PART THREE

ENVIRONMENTAL SUSTAINABILITY

19. Land Tenure and Sustainable Development in Africa by Mallam Yusuf Ali, SAN.....	397
20. Green Jurisprudence: Law's Place in Sustainable Development by P.E. Bondzi-Simpson	417
21. Local Content Law and Sustainability of Development in the Hydro-Electric Power Producing Areas In Nigeria by Dr Usman Abdullateef and Ibrahim Imam	433

CHAPTER NINE

PUBLIC-PRIVATE PARTNERSHIPS AND SUSTAINABLE DEVELOPMENT IN NIGERIA

M.T ADEKILEKUN*

Introduction

Traditionally, public sector entities have financed and maintained infrastructures¹ entirely with public moneys and used their own moneys to provide services.² With dwindling revenues and inability of governments to meet the challenges of infrastructures, public sector officials have turned to other alternative forms of financing, designing and providing much needed infrastructural facilities.³

Public Private Partnerships therefore describes a government service or private business venture which is funded and operated

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¹ "Infrastructure" include development projects which, before the commencement of the Act, were financed, constructed, operated or maintained by the government and which, after the commencement of the Act may be wholly or partly implemented by the private sector under an agreement pursuant to the Act including but not limited to power plants, highways, seaport, airports, canals, dams, hydroelectric power projects, water supply, irrigation, telecommunications, railways, interstate transport systems, land reclamation projects, environmental remediation and clean-up projects, industrial estates or township development, housing, government buildings, tourism development projects, trade fair complexes, warehouses, solid wastes management, satellite and ground receiving stations, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be approved, from time to time, by the Federal Executive Council"

² The public sector entities referred to here are the Federal, States and the Local Governments which are the creation of the constitution.

³ Jaya Sharma, Public Private Partnerships in the United States in International Public Procurement: A Guide to Best Practice. Globe Business Publishing Ltd, UK, 2009.

through a partnership of government and one or more private sector companies.⁴

PPP involves a contract between a public sector authority and a private party, in which the private party provides a public service or project and assumes substantial financial, technical and operational risk in the project. In projects that are aimed at creating public goods like in the infrastructure sector, the government may provide a capital subsidy in the form of a one-time grant, so as to make it more attractive to the private investors. In some other cases, the government may support the project by providing revenue subsidies, including tax breaks or by providing guaranteed annual revenues for a fixed period.⁵

The innovative mechanisms which were created involved a contractual relationship between the public sector and private equity partners and came to be termed public-private partnerships. Under this arrangement, the private sector plays a more central role in the provision of these essential services.

In this work, it is my intention to examine the background to the emergence of the concept and workings of PPP in Nigeria political-economic clime; a clime where infrastructural projects were hitherto funded by the public sector with no participation from the private sector. I also intend to examine the nature of the partnership existing between the parties involved, as well as examining the legal framework put in place to fast-track the success of the concept. Most importantly, I shall trace the nexus between PPP and development in any economy, with particular emphasis on the Nigerian economy. Conclusion will then be drawn in the last part of the paper.

Historical Background for the Emergence of PPP in Nigeria

Nigeria's political economy by independence from Britain in 1960 was an adopted form of colonial capitalism alongside the British

⁴ See Wikipedia, the free encyclopedia accessed from www.wikipedia.com on 20th September, 2009.

⁵ Uzodinma A.A, Public Private Partnership and Nigeria's development retrieved from [www. Phishare.org](http://www.Phishare.org) on 16th September, 2009.

model of parliamentary system of Government.⁶ After independence, Nigeria inherited a system of state control of enterprises from her colonial master, which itself was the product of the philosophy or ideology of the Labour Government of the post-war United Kingdom.

In introducing the welfare state, the Labour Government was of the opinion that the market economy was very unfair and imperfect. Leaving the means of production, distribution and exchange to market forces was considered inequitable by the Nigerian Government and would lead to the marginalization and impoverishment of the people.⁷

It was important for Government to control important sectors of the economy to ensure an equitable distribution of resources. Areas that came under state control as a result of this theory included telecommunications, energy, airlines, shipping, electricity, radio, television, postal services, canals, dams, education and health to mention a few.

In the mid-seventies in Nigeria, the underlining theory of commerce was that Government must be in control of the major sectors of the economy. The ultimate manifestation of this philosophical position was the promulgation of the Land Use Decree of 1978.⁸ This legislation sought to introduce a new land tenure system in Nigeria. This new system transferred the ownership of land to the Governor of a State as the custodian of land for the people.⁹ Transactions on land including transfers, mortgages, leases etc. could only be carried out with the consent of the Governor.¹⁰

By the late seventies, it became clear that Government as an entrepreneur had not succeeded. Most of her investments in

⁶ A Critical Appraisal of Privatisation in Nigeria, see www.hg.org/article.asp? Accessed on 12th January, 2011.

⁷ The Legal Dynamics of Privatisation in Nigeria, see www.babalakinandco.com. Accessed on 15th February, 2011.

⁸ Now the Land Use Act CAP L.

⁹ See S.1 of the Land Use Act.

¹⁰ See S. 22 of the Land Use Act

commerce had been a colossal waste of government revenue. Interestingly, the philosophical position in the United Kingdom had begun to shift. The Labour Government of Sir Harold Wilson had been defeated in the polls by the Conservative Government of Margaret Thatcher.¹¹ The Conservatives were of the firm view that Government had no business in commerce.

The only role of Government was to provide a conducive and an enabling environment for entrepreneurs to flourish.¹² The source of revenue for Government was not in participating in these enterprises but in collecting taxes from these successful businesses.

The idea of Government in Nigeria divesting itself of its interest in commercial enterprises commenced in the early 80s.¹³ The experience of Government in Nigeria had been very similar to that of the United Kingdom. Almost all the businesses had become unsuccessful. The magnitude of the failure of these businesses became very apparent when it was realized that they failed even though they had no competitors as they were virtual monopolies.

It is therefore apparent from these facts that the government alone, at the best of times lacks the capacity to provide the infrastructural requirements of Nigeria. This clearly underscores the need for the participation of the private sector through the Public Private Partnership (PPP) schemes to supplement the efforts of government in the provision of critical infrastructures.

It is as a result of these and other reasons that the National Assembly of Nigeria enacted the Infrastructure Concession Regulatory Commission (Establishment, etc) Act of 2005 to allow the Federal Government Ministry, agency, corporation or body involved in the financing, construction, operation, or maintenance of infrastructure to enter into a contract with or grant concession

¹¹ In May 1979, Labour Party lost the general election to the Conservatives and Margaret Thatcher became Britain's first female prime minister

¹² The government can provide good investment laws that will protect the interest of both foreign and local investors.

¹³ This was the Privatisation and Commercialization Decree No. 25 of 1988; later re-designated "Act"

to any pre-qualified project proponent in the private sector for the financing, construction, operation or maintenance of any infrastructure in Nigeria.

The Nature of Public-Private Partnerships

Goods and services can be delivered by governments in a number of ways that may include the government and the private sector to varying degrees. Public service provision does not imply that government is necessarily also the producer of the services. Therefore, public service provision includes more than the rather limited case where the government is responsible for the design, construction, financing and operation of capital assets and services that these assets generate.

In fact, most government services are provided with assets that governments procure from the private sector or through contracts where private companies build the assets, usually according to government specifications. These assets may include buildings, computers, dams, roads, hospital equipment, military equipment or building of Airport Terminals.¹⁴ Governments may also contract private companies to supply certain services such as maintenance or advisory services. However, none of these arrangements may qualify as a public-private partnership. They may all still be categorized as traditional public procurement. So what is a PPP and how does it engage the private sector differently than traditional procurement? The answers to these questions help to define PPPs as something distinct from both traditional procurement and privatization.

There is currently no clear definition of what constitutes a public-private partnership; the literature offers several possibilities.¹⁵ PPPs refer to arrangements where the private sector supplies infrastructure assets and services that traditionally have been

¹⁴ See S.36 of the Infrastructural Concession Regulatory Establishment Act on the types of infrastructure.

¹⁵ Report of the International Monetary Fund in Public-Private Partnerships, In Pursuit of Risk Sharing and Value for Money' (IMF 2006:1 and 2004:4).

provided by the government while, according to the European Investment Bank, PPPs are "...relationships formed between the private sector and public bodies often with the aim of introducing private sector resources and/or expertise in order to help provide and deliver public sector assets and services."¹⁶

Public-Private Partnerships therefore fill a space between traditionally procured government projects and full privatization. This is a broad space to fill. In addition, public-private partnerships represent cases where the private services have traditionally been provided by the public sector. PPPs are not the only type of relationship to fill this space. The space between traditional procurement and full-scale privatization may include- in addition to PPP contracts- short-term management and outsourcing contracts, concession contracts and joint ventures between the public and private sectors.¹⁷ Furthermore, the degree of ownership of assets and capital expenditure by the private partners may vary, with very limited or no capital expenditure in the case of a management contract, whereas the private sector is responsible for the design, building, operation and financing of a capital asset in full-scale concession or PPP contract. To deliver the service, the private partner receives payment from either the government (at regular intervals) or user charges, or both.¹⁸

Roles of Public-Private Partnerships in Nations' Development

The National Assembly of Nigeria has enacted a law¹⁹ to allow the private sector to design, build, finance, and/operate new and existing infrastructural facilities in order to improve the delivery of services and management of facilities hitherto provided by the public sector. Governments are attracted by the benefits of mobilizing private capital: the estimated demand for investment in

¹⁶ Ibid at page 16.

¹⁷ Ibid at Page 17.

¹⁸ An example is the payment of Tolls in Lagos (Lekki-Epe Express Way). This is a means by which private users pay for the services provided through PPP.

¹⁹ See the Infrastructural Concession and Regulatory (Establishment E.T.C) Act of 2005.

public services shows that government and even donor resources cannot fill the investment gap alone, and so harnessing private capital can help to speed up delivery of public infrastructure.²⁰

Public-Private Partnerships, in particular those with long term contracts, can bring significant benefits for governments in the delivery of public services, such as the followings:

Greater Efficiency in the use of Resources

By allocating the management of risks optimally between the public and private sectors, a well managed PPP preparation and bidding process can enable a more efficient use of resources over the lifetime of the asset, as the private partner has an incentive to consider the long term implications of the cost of design and construction quality or the cost of expansion in the case of existing facilities.²¹ At the time, the long-term nature of the contract can generate greater certainty (or even a reduction) in the price of service delivery, in real terms.²²

This is especially the case for those PPPs where the public sector is purchasing a service on behalf of the tax payer: known prices have clear value within a highly constrained public sector budgetary system, as they greatly reduce the likelihood of surprises down the line. This also ensures budgeting for proper long-term maintenance of assets, which is often omitted in traditional forms of public sector procurement to the detriment of the asset and the tax payer.

Capital at Risk to Performance

The explicit exposure of capital to long-term performance risk gives the private party an incentive to design and build the asset on time and within budget and to take into account the cost of

²⁰ Edward Farquharson, Clementia Torres de Mastle and E.R. Yescombe, 'How to Engage with the Private Sector in Public-private Partnerships in Emerging Markets' (2011).

²¹ See S.3 of the ICRC Act which provides for competition and transparency in the bidding process.

²² Long term PPP projects normally take between 25-60 years

longer-term maintenance and renewal. It underpins the required allocation of risks.

Quality Assurance and Scrutiny

The PPP process usually involves a much greater level of quality assurance than the standard public procurement process as the public authority prepares its projects and engages with the market. The public authority will face scrutiny by parties outside government, such as lenders and investors, whose capital will be at risk over the long term, depending on the performance of service delivery.

More Open Scrutiny

The long-term commitment required of a PPP usually requires information about the true long-term risks and therefore costs to deliver the public service. This scrutiny can generate a more informed and realistic debate on project *selection* and a focus on *output* and even *outcomes*. Such additional quality assurance and scrutiny are often absent in conventionally procured projects.

These benefits have important implications for PPP where the availability of long-term private funding is more constrained. In other words, there are some fundamental policy drivers to use PPPs even if, at times, private funding is constrained. Looking ahead, good PPP structures can endure and can simply adapt to changes in the market.

Legal Frameworks for Public-Private Partnerships in Nigeria

The principal legislation for Public Private Partnerships in Nigeria include the Infrastructure Concession Regulatory Commission (Establishment, etc) (ICRC) Act 2005 and the Public Procurement Act 2007.²³ These laws set out the requirements for competition and private sector participation in all public procurement as well as specify requisite approvals for all PPP contracts in Nigeria. Section 1 of the Act provides:

²³ Act No 14 of 2007

(1) As from the commencement of this Act, any federal Government Ministry, Agency, Corporation or body involved in the financing, construction, operation or maintenance of infrastructure, by whatever name called, may enter into a contract with or grant concession to any duly pre-qualified project proponent in the private sector for the financing, construction, operation or maintenance of any infrastructure that is financially viable or any development facility of the Federal Government in accordance with the provisions of this Act.

(2) This Act shall apply to investment and development projects relating to any infrastructure of any Federal Government ministry, agency, corporation or body.

Infrastructure Concession Regulatory Commission drives and regulates infrastructure concessions in Nigeria. The Commission was set up in 2008. The ICRC Board consists of one member from each of Nigeria's six geopolitical zones. By the provisions of the ICRC Act, ex - officio members that also serve on the Board include the Secretary to the Government of the Federation, the Attorney General of the Federation, the Minister of Finance, the Governor of the Central Bank and the D-G of ICRC.

The Powers of the Commission

Essentially, the ICRC is empowered to:

- Provide general policy guidelines, rules and regulations for the operation of P3 projects in Nigeria.
- Take custody of every concession agreement entered into by the Federal Government and any of its agencies
- Ensure efficient execution of concession contracts
- Ensure strict compliance both with the Act and with the terms of the concession contract.

Public Procurement Legislations

Public procurement relates to the utilization of public fund to meet the daily requirements of governance. Based on this, apart from the Public Procurement Act, there are other statutes containing provisions that, though not specifically focused on public purchase,

are nevertheless very relevant to the way government goes about its fiduciary relationship and responsibility in public purchase and acquisition.²⁴ To this end, there are constitutional, statutory and administrative provisions, regulations and standards that must be adhered to in public procurement. Additionally, statutory provisions regulations, sustainable development and public officers' codes of conduct and ethics are always directly or tenuously related to, and to a large extent applicable to, public procurement.

Applicable Legislative Framework to Public Procurement in Nigeria

The Constitution of the Federal republic of Nigeria, 1999 provides that "Nigeria shall be a federation consisting of States and a Federal Capital territory".²⁵ Inherent in this theory is the recognition of the division of powers between the federal and state governments. Precisely, section 4 of the Constitution acknowledges the bifurcation of legislative powers between the federal and state governments. On issue relating to federal matters, the national Assembly²⁶ legislates, while on matters pertaining to the States, it is the respective State houses of Assembly that have the powers to make laws.

The legislative powers of the national assembly, as contained in section 4 of the Constitution, are further amplified in the Exclusive and Concurrent Legislative Lists in part II of the Schedule to the Constitution.²⁷ It has been customary when interpreting federal constitutions to treat any issue(s) not found in the two lists mentioned above as residual. Though public procurement is not an

²⁴ Benson Dele Oloworaran, 'The Law and Practice of Public Procurement in Nigeria', Global Behulah Publication (2011)

²⁵ The Constitution of the Federal Republic of Nigeria, 1999, S.2(2)

²⁶ Nigeria operates a bicameral legislature at the federal level; hence the National Assembly is composed of both the senate with equal representation of 1 Senators from each of the 36 states and 1 representative from the Federal Capital Territory; and the House of Representatives consisting of 160 members who are demographically determined.

²⁷ Items listed in the Exclusive list are exclusive to the National Assembly; those in the Concurrent List can be concurrently legislated upon by both the National Assembly and the State Houses of Assembly to the extent provided for by the Constitution.

item for legislation under the Exclusive and concurrent lists, there are ample and various legal as well as constitutional grounds to resolve that it is an issue on which both the federal and state legislative assemblies can legislate in their respective spheres.

Firstly, public procurement policies relate to public due process and transparency in handling public expenditure. The legislature has power to control and regulate how public fund is utilized. Specifically, section 13 of the Constitution under the Fundamental Objective and Directive Principles of State Policy state that:

It shall be the duty and responsibility of all organs of government²⁸ and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of the Constitution

Section 15(5) of the Constitution provides that "the state shall abolish all corrupt practices and abuse of power". Additionally, Section 16(1) enjoins the state to:

Within the context of the ideals and objectives for which provisions are made in the Constitution harness the resources of the nation and promote national prosperity and an efficient, dynamic and self-reliant economy

The duty and responsibility imposed by this Chapter of the Constitution on all organs of government can only be carried out by the legislative arm through its law making powers. Judicial decisions as well as juridical interpretations therefore are to the effect that the legislatures can legislate to bring into effect the provisions of Chapter II of the constitution.

Since public procurement has to do with public purchase by government entities, it follows that both the national Assembly

²⁸ The Supreme Court has recognized that it is the responsibility of all government organs and even private individuals to "conform to, observe and apply" the principles under chapter II of the Constitution of the Federal Republic of Nigeria, 1999. See *AG Ondo v AG Federation* (2002) 9 NWLR (Pt 772) 1 at 381, paras B-F, Per Uwando JSC.

and the State Houses of Assembly have concurrent legislative competence in their respective jurisdictions to legislate on issues affecting public procurement made by procurement entities within the federal Government or of which money from the federal treasury will be disbursed to meet the obligations under the procurement contract. Effectively too, the State Houses of Assembly can legislate on public procurement as it relates to purchases by state procuring entities or when money from the state government will be used in paying for the procured items.

This argument is reinforced and sustained by the legislature over public fund and spending. The National Assembly has overview of Federal Government finance. Section 80 (4) of the constitution provides that: ²⁹"No moneys shall be withdrawn from the consolidated Revenue Fund of the Federation except in the manner prescribed by the National Assembly"

In the same vein, as it relates to the component states, section 120 (4) provides that: "No money shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the State except in the manner prescribed by the House of Assembly"

Public procurement laws regulate the manner in which government money is to be spent in the market place and as such, since the fund of the respective governments are regulated by the respective legislatures; they have the capacity to make legislation on the spending.

The principal legislation on public procurement in Nigeria, at the Federal level, is the Public Procurement Act.³⁰ The Public Procurement Laws³¹ of the various states that have already passed laws in that regard are applicable in the state.

²⁹ See also item I of the Exclusive Legislative List, giving the National Assembly powers to make law on issues relating to the "Accounts of the Government of the Federation, and of office, courts, and authorities thereof, including audit of these accounts"

³⁰ Act No. 14, of 2007

³¹ These are the legislations made by the State Assemblies.

In states that have not yet passed specific legislations regulating public procurement, budget regulations (appropriation bills) and other regulations on project implementation regulate public procurement. In some of the states, due process handbooks and manuals were also developed for use in public procurement.³²

Conclusion

There are those who feel that there is no place for the private sector and its all pervading profit imperative in the provision of critical infrastructures like health, education, roads and other social services. Feelings can run very high and, generally speaking, there are no easy votes to be won by the government that argues the case for more private sector involvement. The electorate seems to want new roads, better hospitals, more modern schools facilities and so on, but few would credit improvement in these matters to public-private partnership (PPP) model. Nonetheless, governments of all political colours, in the capitalist world at least, have grasped the opportunity that private sector participation offers to modernize and improve on their ageing infrastructure.

As stated earlier in this paper, PPP will go a long way in helping Nigeria in the provision of infrastructures. State Governments especially Lagos and Rivers states³³ have adopted this PPP scheme as a solution to their infrastructural deficits.

Public-Private Partnerships are defined not only in terms of what they are not (i.e. distinguishing them from traditional procurement, privatization and concessions), but also in terms of what they are. A public-Private Partnership is an agreement between the government and one or more private partners according to which the private partners deliver the service in such

³² See for example the Kwara State "Due Process Handbook," available at: www.kwarastate.gov.ng/kwara-state-due-process-handbook.html, visited 10/07/10

³³ See Public Private Partnership in Infrastructural Development Law NO 5 of Rivers State.

a manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners.

Value for money should be the primary objective for entering into a public-private partnership, and the use of private finance in a PPP does not make a project affordable if that project is unaffordable under traditional procurement.